

F 392

B7 U495

Calendar No. 879.

CONGRESS, {
3d Session. }

SENATE.

{ REPORT
No. 940.

NEW MEXICO BOUNDARY LINE.

DECEMBER 19, 1910. —Ordered to be printed.

Mr. CULBERSON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany S. J. Res. 124.]

The Committee on the Judiciary, which has had under consideration Senate joint resolution 124 (61st Cong., 3d sess.), for reasons hereafter fully stated, report the same favorably and recommend its passage.

The contention of the constitutional convention of New Mexico, which is referred to in the joint resolution, seems to be that the boundary line of the Texas Panhandle on the west from latitude 36.30° north to latitude 32° north is located west of the true one hundred and third meridian of longitude west from Greenwich, and that a strip of territory between the true one hundred and third meridian and the line as now established and recognized by the United States and the State of Texas, about 310 miles in length, and varying in width from a little over to considerably less than 3 miles, of right belongs to New Mexico.

SUMMARY OF THE LEGISLATION ENACTED BY THE CONGRESS OF THE UNITED STATES AND THE LEGISLATURE OF THE STATE OF TEXAS WITH REFERENCE TO THIS BOUNDARY AND OFFICIAL ACTS OF THE EXECUTIVE DEPARTMENTS OF BOTH GOVERNMENTS WITH REGARD THERETO.

The United States, by an act of the Congress, approved September 9, 1850 (9 Stat. L., p. 446), proposed to the State of Texas that in consideration of the payment of \$10,000,000 to her the State would cede certain territory to the United States, and agree that her boundary on the north should commence at the intersection of the one hundredth meridian of longitude west from Greenwich and the parallel of 36.30° north latitude; run thence due west to the one hundred and third meridian of longitude west from Greenwich; thence due south along said meridian to the thirty-second degree of north latitude, etc.; the line from the intersection of the one hundred

and third meridian and 36.30° north latitude south to 32° north latitude to constitute the boundary line between the Texas Panhandle and New Mexico.

By an act of her legislature, approved November 25, 1850 (Gammel's Laws of Texas, vol. 3, p. 833), this proposal was accepted by the State of Texas.

The Legislature of the State of Texas, by an act approved February 11, 1854 (Gammel's Laws of Texas, vol. 3, p. 1525), provided for the appointment of a commissioner by the governor to act in conjunction with a commissioner to be appointed by the United States in running and marking the line here under discussion between the State of Texas and the Territory of New Mexico, in accordance with the compact of 1850.

An act of the Congress approved June 5, 1858 (11 Stat. L., 310), provided for the appointment of a commissioner by the President of the United States to act in conjunction with the Texas commissioner in running and marking, among others, this line.

Pursuant to these acts by the legislatures of their respective governments, in 1858 John H. Clark was appointed commissioner on behalf of the United States, and William R. Scurry commissioner on behalf of the State of Texas. After some correspondence between the Secretary of the Interior and the governor of Texas it was decided to begin running and marking the line between Texas and New Mexico at the Rio Grande; thence eastward along the thirty-second parallel to the one hundred and third meridian; and thence north along that meridian as far as practicable. (Ex. Doc. No. 70, 47th Cong., 1st sess., pp. 206, 207.)

The survey was begun on the ground by the joint commissioners January 3, 1859, and the intersection of the Rio Grande and the thirty-second parallel having been determined, the line was run eastward and marked along that parallel to the one hundred and third meridian, or what was determined to be the one hundred and third meridian, by transfer from Frontera, Mexico, in accordance with instructions to Commissioner Clark by the Secretary of the Interior. (Ex. Doc. 70, p. 264.) On the 23d of May, 1859, the running and marking of the one hundred and third meridian north was begun and continued by John H. Clark alone, the Texas commissioner having abandoned the work. Clark ran and marked the line north 70 miles, or a little beyond the thirty-third degree of latitude (*ib.*, p. 298). Finding it impracticable, because of scarcity of water, to proceed further, he then returned west to the Pecos River, and proceeded up that river and across to the intersection of the one hundred and third meridian and 36.30° north latitude. He located that intersection, which constituted the northwest corner of Texas, by observations to obtain the latitude, and by taking up the one hundred and third meridian, as then established at the Kansas boundary, and transferring it to latitude 36.30° , in accordance with his instructions from the Secretary of the Interior (*ib.*, p. 265). Having been joined at this intersection by another Texas commission, the prolongation of the one hundred and third meridian south was begun on August 23, 1859 (*ib.*, p. 299), and continued to a point south of the thirty-fourth degree of north latitude (*ib.*, p. 278), where, because of the lateness of the season and the occurrence of a succession of sand hills, the work was halted late in October, and

never resumed along this meridian by him or any other commissioner representing the United States.

Commissioner Clark, in his report of October 27, 1859, to the Secretary of the Interior, states that he ran the line on the one hundred and third meridian north (from its intersection with the thirty-second parallel) 70 miles (*ib.*, p. 279); and that he ran and marked the line on the one hundred and third meridian south from its intersection with latitude 36.30° , 184 miles (*ib.*, p. 280), erecting altogether on both lines 26 monuments, chiefly of earth and stone (*ib.*, pp. 302, 303).

The Commissioner of the General Land Office of the United States in a letter to the Secretary of the Interior, of date January 11, 1882, states that the office work connected with his surveys was never completed by Commissioner Clark, but that all of the field work was executed, except a part of the west boundary which was not run, viz, from 33 north latitude to 33.45 north latitude (*ib.*, p. 1), which substantially agrees with Clark's report of October 24, 1859, that—

After the establishment and marking of the corner the one hundred and third meridian was taken up and surveyed across the Canadian and to a point on the Llano Estacado south of the thirty-fourth parallel, a distance, with the survey from the Kansas boundary, of about 240 miles. (*ib.*, p. 278.)

And his letter of July 16, 1860, that he purposes "running out and marking the arc that remains (about $50'$) of this meridian on my return," referring of course to the hiatus between the thirty-third and thirty-fourth parallels which had not been actually run on the ground. (*ib.*, p. 280.)

This left a hiatus of about 56 miles between the termini of Clark's north and south lines along the one hundred and third meridian, covering the greater portion of the western boundaries of the present counties of Yoakum and Cochran in the State of Texas and a portion of the eastern boundary of the county of Chaves in New Mexico.

By the act of March 3, 1891, the Congress of the United States confirmed and adopted the lines run and marked by Commissioner Clark in the following language:

That the boundary line between said public-land strip and Texas and between Texas and New Mexico established under the act of June 5, 1858, is hereby confirmed. (26 Stat. L., p. 71.)

This act of the Congress was in terms accepted by a joint resolution of the Legislature of the State of Texas passed on March 25, 1891, duly establishing and accepting the lines laid down by Clark as the true boundary line between Texas and New Mexico. (Gammel's Laws of Texas, vol. 10, p. 196.)

CONNECTION OF THE TERMINI OF CLARK'S LINES.

In 1892 W. D. Twitchell, a special deputy surveyor of the Howard land district in the State of Texas, and Mark Howell, county surveyor of Chaves County, N. Mex., as disclosed by a report bearing date August 24, 1892, which is printed in full in House Report No. 1788 (59th Cong., 1st sess., pp. 9-13), retraced Clark's line from the southeast corner of New Mexico to its termination, 70 miles north, which they determined to be latitude $33^{\circ} 58''$, and thence ran and marked a line connecting that point with the termination of Clark's 184-mile line down the one hundred and third meridian from the northwest

corner of Texas, the hiatus or gap thus connected by Twitchell and Howell being 56 miles 296 varas long. Twitchell was an official surveyor, acting under due appointment and direction of the commissioner of the general land office of the State of Texas, and Howell was the county surveyor of Chaves County, N. Mex., in the absence of other information acting presumably under that section of the laws of the Territorial Assembly of New Mexico of 1891 (chap. 33, Laws 1891), providing:

Where a boundary line between two counties is to be established, the county surveyors or their deputies of the two counties affected by such boundaries shall together make the survey and establish the line and erect monuments, etc.

In a letter dated November 30, 1910, the acting commissioner of the general land office of the State of Texas, among other things, says, in regard to this Twitchell-Howell line connecting the termini of Clark's lines:

The report and the plat filed by Mr. Twitchell was approved by Land Commissioner W. L. McGaughey, and the line surveyed by him platted upon the maps of Cochran and Yoakum Counties, and it has uniformly been shown by those maps since the report was filed. * * * All sections or surveys of land except three touching the line (the Twitchell-Howell line) which connects the termini of Clark's lines belong to the permanent free-school fund and have been sold. * * * The State, acting through its general land office, has proceeded to treat the line run by Mr. Twitchell as the correct boundary. * * * There are 47 sections or surveys of school land and 3 sections of private land whose western lines coincide with that portion of the State boundary run by Mr. Twitchell.

The report by Twitchell and Howell of their survey indicates that in connecting the termini of Clark's lines they followed the correct surveyor's rule and the rule of law, and the rule confirmed and adopted by the Supreme Court of the United States in *Land Company v. Saunders* (103 U. S., 323): That where two points of a survey can be definitely located and the ensuing call for direction from either will not connect them the proper method is to connect them by the line of shortest distance between them.

IDENTIFICATION AND RETRACEMENT OF CLARK'S LINES.

Commissioner Clark erected 26 monuments, chiefly of earth and stone, upon the lines he ran along the one hundred and third meridian (Ex. Doc. 70 ante, pp. 302, 303).

Bulletin No. 194, series F, Geological Survey (U. S.), gives the following information in regard to the retracing of Clark's line running southerly from the northwest corner of Texas and the identification of his monuments:

In 1882-1885 W. S. Mabry, district surveyor of Dallam, Hartley and Oldham Counties, located certainly the northwest corner of Texas, as fixed by Clark in 1859, the same constituting the northwest corner of the X I T pasture fence. Mabry ran the western boundary line of Texas thence southward along Clark's old line (p. 29), identifying Clark's monuments 15, 16, 17, and 20 (pp. 39, 40).

Clark's monuments 15 and 16 on his old line, as identified by Mabry, were also identified by United States Surveyors Taylor and Fuss on March 5 and 6, 1883 (pp. 29, 30).

In 1900 Levi S. Preston, a United States deputy surveyor, entered into a contract with the General Land Office of the United States to redetermine and retrace Clark's line along the northern part of the

one hundred and third meridian, and connect his surveys in New Mexico therewith. In the report of his survey Preston states that he spared neither time nor expense in seeking to properly relocate this line, riding more than 200 miles on horseback to interview old-timers who had assisted in building the X I T pasture fence, which coincided with Clark's line as retraced by Mabry; and that he also had a conference with Mabry, and received from the latter a copy of his retracement made in 1882-1885 of Clark's line. Thereafter, on July 11, 1900, Preston positively identified Clark's monuments 15 and 17, which Mabry had previously identified and used in his retracement of the line (p. 39). Preston also found Clark's monument 16, and satisfied himself that the stone placed by Mabry on the State line was in the position of Clark's old monument 20 (p. 40). Preston further states that he excavated around the northwest corner of the X I T fence, which Mabry found marked with a large mound of earth and a cedar post suitably inscribed, and accordingly adopted as the northwest corner of Texas as located by Clark. Preston also was satisfied from his investigations that this corner was the true northwest corner of Texas as located by Clark, saying:

This point being almost in true alignment with the old Clark monuments found 37 miles and 75 miles south, agreeing very closely with Mr. Mabry's tie of 1882, and within 150 links of the proper position east of the Johnson monument, as determined in 1858 and 1859, therefore I set a sandstone 60 by 12 by 10 inches, 36 inches in the ground for the northwest corner of the State of Texas, marked "N. W. cor. Texas" - on east; "N. M." on west; "1859" on south; and "1900" on north faces (p. 41).

Preston's retracement of Clark's line extended from the Canadian River to the northwest corner, a distance of 76 miles (p. 37).

The monument erected by Clark at the southeast corner of New Mexico, the beginning of his projection of the one hundred and third meridian northward, in 1859, has been positively identified, both as to that monument itself, and also by bearings obtained from his last or thirty-first monument on the thirty-second parallel. (H. Rept. 1788, 59th Cong., 1st sess.) This corner monument was adopted as the starting point of their survey northward along the old Clark line by Twitchell and Howell in 1892. From this starting point they retraced Clark's line 70 miles north, identifying several of his monuments, and thereafter connected the northern end of his 70-mile line with the southern terminus of his 184-mile line, as heretofore described. (See report, ante.)

EXERCISE OF SOVEREIGNTY BY THE STATE OF TEXAS OVER THE TERRITORY EAST OF THE LINES, AND ACQUIESCENCE BY THE UNITED STATES THERETO.

Surveyors of the State of Texas have run and marked this western boundary along various portions of Clark's lines.

By an act of the legislature of the State, approved February 20, 1879, all the vacant and unappropriated public domain, among others, in the counties of Dallam, Hartley, Oldham, Deaf Smith, Parmer, Bailey, and Cochran, the western boundaries of which, in their order as named, extend for 210 miles from the northwest corner of the State south along its western boundary, was appropriated and set apart for the purpose of erecting a new State capitol. Under this

act patents were issued by the State to all of the land running from the northwest corner of Texas for 150 miles down this western boundary line—the Clark line—which had unquestionably been run and marked upon the ground in 1859 for that distance. Fences were erected along this 150-mile strip, and more than two-thirds of the land adjacent thereto has been sold by the syndicate first acquiring it, and it is now owned by many diverse owners.

As said by the land commissioner of the State of Texas in a letter to the governor of the State on December 17, 1902:

A great number of titles have been patented to people along said lines, who in many instances have erected valuable and permanent improvements thereon.

The town of Farwell, the county seat of Parmer County, Tex., a place of several hundred inhabitants, with numerous valuable buildings and other improvements, is located wholly upon the territory which the constitutional convention of New Mexico claims.

Necessarily, the State of Texas has assessed and collected taxes upon all of the lands it has sold and all that privately owned along these lines. The citizens resident along it have exercised the right of suffrage in Texas. Their children have been included in the school census of the State and the funds of the State appropriated and paid out for their education. In short, the State has exercised complete political and police jurisdiction over them and over their property for a series of years.

Nor have any of these acts been in anywise controverted or questioned by any department of the United States. On the other hand, as disclosed by a letter from the Commissioner of the General Land Office of the United States under date of January 31, 1906 (House report, ante, p. 5), that office, properly regardful of the rights of the State of Texas, after stating that certain surveys of public land recently made in New Mexico had been terminated at points "indisputably west of the so-called syndicate fence, which, it has been determined, is approximately in the location of the Clark line," states that it "has so framed instructions as to avoid any steps being taken which would tend toward encouraging encroachment by public-land claimants upon lands east of the syndicate fence." This syndicate fence was built upon Mabry's retracement in 1882-1885 of Clark's line of 1859, and Mabry's retracement was verified, for 76 miles at least, by United States Surveyor Preston in 1900.

Henry Gannett, the geographer of the United States Geological Survey, in a bulletin published by the Department of the Interior in 1904, treats this boundary as settled, saying at page 113:

The boundary line between Texas and New Mexico were run and marked in 1859-60 under the Department of the Interior.

While no right has ever existed in the Territorial government of New Mexico to authoritatively raise any contention whatever in regard to this boundary, it may be noted that an examination of the acts of the Territorial Assembly from 1897 to 1909, inclusive, fails to disclose the passage or adoption of any statute, resolution, or memorial in any way questioning the boundary, or seeking to set up any adverse claim to the ownership exercised by the State of Texas.

It is reasonably clear that Clark did not establish the true astronomical one hundred and third meridian, yet it is no longer an open

question that ancient errors in the running and marking of a boundary line, which have been accepted and acted upon and acquiesced in by both parties, can not be corrected.

The Supreme Court of the United States in *Virginia v. Tennessee* (148 U. S., 525) settled that question when it said:

Nor is it any objection that there may have been errors in the demarcation of the line which the States themselves by their compact sanctioned. After such compacts have been adhered to for years, neither party can be absolved from them upon showing errors, mistakes, or misapprehension of their terms, or in the line established, and this is a complete and perfect answer to the complainant's position in this case.

In the more recent case of *Louisiana v. Mississippi* (202 U. S.) the Supreme Court say, at page 54:

Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area, that Louisiana has always asserted it, and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that as between the States of the Union, long acquiescence in the assertion of a particular boundary, and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive—

Citing *Virginia v. Tennessee*, supra, and other authorities.

It should be noted that the court in this last case cites the bulletin of the Geological Survey compiled by Henry Gannett in 1904, heretofore quoted from in this report.

In the very recent case of *Maryland v. West Virginia* (217 U. S., 1), decided February 21, 1910, the Supreme Court of the United States specifically held that even if a meridian boundary line is not astronomically correct it should not be overthrown after it has been recognized for many years and become the basis for public and private rights of property (p. 44).

When it is recalled that the northwest corner of Texas, as located by Clark in 1859, has been definitely identified by both United States and Texas surveyors; that three of the monuments erected by Clark upon the line he ran and marked from that corner south have likewise been identified by surveyors of both governments and the position of a fourth definitely determined; that the monument erected by him at the other end of the line fixing the southeast corner of New Mexico was still upon the ground in 1892, is now definitely marked and was used as a starting point in 1892 by Surveyor Twitchell, acting officially for the State of Texas, and Surveyor Howell, the county surveyor of Chaves County, N. Mex., and that they identified several of Clark's monuments along the line he ran thence northward, the following language of the Supreme Court in the case last cited seems peculiarly pertinent:

It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular and not a uniform astronomical north-and-south line, but both surveyors appointed by the States represented in this controversy were able to locate a number of points along the line, and the north limit thereof is fixed by a mound and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point; and we think, from the evidence in this record, that it can be located, with little difficulty by competent commissioners.

It is unnecessary to discuss the proposition that the enabling act to admit New Mexico into the Union as a State in nowise changes the present status of this boundary line, nor would its actual

admission as a State. Directly in point, however, are these excerpts from the opinion of the Supreme Court in the case of *Missouri v. Iowa* (7 How., 667):

The present controversy originated in 1837 between the United States and the State of Missouri, and was carried on for ten years before Iowa was admitted as a State. Previous to the controversy, and after Missouri came into the Union in 1821, many acts had been done by both parties most materially affecting the controversy, and tending to compromise the claims now set up, the one side as well as the other. The new State of Iowa came into the Union December 27, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new boundary on the north as was done on the west; and so, likewise, Iowa is bound by the acts and admissions of the United States tending indirectly to confirm and establish a particular line as the northern boundary of Missouri.

And at page 674:

From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union; and as already stated, Iowa must abide by the condition of her predecessor and can not now be heard to disavow the old Indian line as her true southern boundary.

Summarizing them the facts appear to be:

(1) That the one hundred and third meridian from latitude 36.30 north, south to latitude 32 north, was adopted as the western boundary line of the Texas Panhandle by compact between the Governments of the United States and the State of Texas in 1850.

(2) That 70 miles were run and marked northward along the one hundred and third meridian from the southeast corner of New Mexico, and 184 miles were run and marked southward along said meridian from the northwest corner of Texas by John H. Clark, commissioner for the United States in the year 1859.

(3) That a portion of Clark's old line south from the northwest corner of Texas along the one hundred and third meridian was retraced by W. S. Mabry, an official surveyor of the State of Texas, in the years 1882-1885, and four of Clark's monuments, including the one marking the northwest corner, identified certainly, and the position of one other (No. 20) accurately. That Clark's monuments 15 and 16 so identified by Mabry were likewise identified by United States Surveyors Taylor and Fuss in 1883.

(4) That the Congress of the United States and the legislature of the State of Texas by appropriate legislative enactments in 1891 adopted Clark's lines, as run and marked on the ground as the true boundary.

(5) That the Clark line for the 70 miles north from the southeast corner of New Mexico has been retraced and his monuments identified in a joint survey by surveyors of Texas and New Mexico, who also ran and marked a line connecting the termini of Clark's north and south lines in 1892, and that this latter line bridging the gap has been officially recognized and acted upon by the State of Texas and acquiesced in by the United States.

(6) That State Surveyor Mabry's line from the northwest corner south for 76 miles was retraced by United States Surveyor Preston, and the Clark monuments identified by Mabry likewise identified by Preston, and the northwest corner fixed by Mabry found to be correct by Preston, and adopted and properly marked by the latter in 1900.

(7) That the State of Texas has sold nearly all of the land whose western boundaries coincide with Clark's lines; and also all of the land except three sections privately owned, whose western boundary coincides with the line run by Twitchell and Howell in 1892 connecting the termini of Clark's lines.

(8) That the State has for many years exercised complete political and police jurisdiction over the territory east of the Clark lines and the Twitchell-Howell line.

(9) That the United States have acquiesced in such acts of ownership and jurisdiction by the State, and officially recognized the Clark lines when called into question by attempted locators on land alleged to be in New Mexico.

From which it seems clear—

(1) That irrespective of the correct astronomical location of the one hundred and third meridian between latitude 36.30 and latitude 32, the Clark lines, as run and marked on the ground, both by formal legislative adoption in 1891 by both governments and by long exercise of sovereignty by the State and acquiescence by the United States, constitute the true boundary and can not be changed.

(2) That the Twitchell-Howell line, run and marked on the ground in 1892, connecting the termini of the Clark lines, follows the rule of law applicable to such cases, and its adoption by the State of Texas and the acquiescence therein by the United States, and the intervening of numerous private property rights with reference thereto, constitutes it the true boundary.

(3) That the enabling act to admit New Mexico into the Union as a State in nowise changes the status of this boundary, and as the United States have formally adopted and confirmed 254 miles of it and are estopped by long acquiescence from setting up any adverse claim as to the other 56 miles run and marked in 1892, New Mexico, as a State, will be concluded by the acts of her predecessor in sovereignty.

O

LIBRARY OF CONGRESS



0 014 647 109 2

1
1

LIBRARY OF CONGRESS



0 014 647 109 2